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No. 91-313

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LARRY DODSON, *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the courts below abuse their discretion when, based on the facts of this case, they approved a Rule 23(b)(2) class action settlement that provides principally for class-wide equitable relief and does not permit class members to opt out?

PARTIES TO THE PROCEEDING BELOW

The parties to this proceeding in the court of appeals were: Plaintiffs-Appellees Dennis Hazen Huguley, James Kennedy, Larry Kitchen, Darnita Stein, and Robert Raglin, on behalf of themselves and others similarly situated; Plaintiff-Appellant Larry Dodson (purporting to represent a group of unnamed nonparty objectors to the Consent Decree); and Defendant-Appellee General Motors Corporation.

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RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION

Respondent General Motors Corporation ("GM")[1] respectfully requests that this Court deny the petition for a

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[1] Pursuant to Rule 29.1 of the Rules of this Court, GM lists the following affiliates and non-wholly owned subsidiaries: Aralmex, S.A. de C.V. (Mexico); Automotriz Gencor S.A. (Ecuador); Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador); Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico); Compresores Delfa, C.A. (Venezuela); Convesco Vehicle Sales GmbH (Germany); Daewoo Motor Co., Ltd. (Korea); DHB-Componentes Automotives S.A. (Brazil); Fabrica Colombians de Automotores S.A. ("Colomotores") (Colombia); General Motors de Colombia S.A. (Colombia); General Motors Egypt, S.A.E. (Egypt); General Motors Iran Limited (Iran); General Motors Kenya Limited (Kenya); GM Allison Japan Limited (Japan); GM Fanuc Robotics Corp. (USA); Industries Mecaniques Meghrebires, S.A. (Tunisia); Industrija Delova Automobils, Kikinda (Yugoslavia); Isuzu Motors Limited (Japan); Isuzu Motors Overseas Distribu-

writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That *per curiam* opinion is unreported, and is reprinted in the Petitioners' Appendix ("Pet. App.") at 27a-33a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent supplements Petitioners' listing of constitutional and statutory provisions involved with the following, reprinted in Respondent's Appendix ("Resp. App.") at 4a-7a:

Rule 23 of the Federal Rules of Civil Procedure;

Rule 10(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE[2]

Background

This broad-based race discrimination class action was brought on behalf of a class of approximately 10,000 black incumbent and former salaried employees of GM, who claimed that the GM salaried employee performance appraisal system discriminated against blacks in promotion, pay, and other terms and conditions of employment.

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tion Corp. (Japan); Kabelwerke Reinshagen GmbH (Germany); Kabelwerke Reinshagen Werk Berlin GmbH (Germany); Kabelwerke Reinshagen Werk Neumarkt GmbH (Germany); Moto Diesel Mexicana, S.A. de C.V. (Mexico); Motor Enterprises, Inc. (USA); New United Motor Manufacturing, Inc. (USA); Omnibus BB Transportes, S.A. (Ecuador); Promotora de Partes Electronicos Automotrices (Mexico); P.T. Mesin Isuzu Indonesia (Indonesia); Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain); Suzuki Motor Co., Ltd. (Japan); Unicables, S.A. (Spain). GM has no parent company.

[2] The opinions below are reprinted in Petitioners' Appendix at 3a-33a, and fully summarize the factual and procedural background of this case. Substantial portions of these opinions also appear as unattributed quotations in the "Statement of the Facts" and "Proceedings Below" sections of the Petition. *See* Pet. at 17-23.

After more than five years of vigorous litigation, the case was settled just prior to trial. The parties' agreement was embodied in a Consent Decree providing extensive equitable and other relief to the class. The heart of the Decree is the class-wide equitable relief it provides, which includes:

—A complex computer monitoring system that will statistically track promotions and salary increases for incumbent class members during the five-year life of the Decree, and a commitment to redress any statistically significant shortfalls for blacks in these areas, as identified through the monitoring process;

—Monitoring and review of employee complaints regarding individual performance appraisals;

—Detailed recordkeeping by GM with respect to all aspects of the Decree, as well as annual reports to class counsel, to monitor GM's compliance with the Decree.

The Decree also requires increases in base salary for approximately one thousand incumbent class members, one-time monetary awards to approximately 2,800 ex-employee class members, and payment of class attorneys' fees and costs. It does not provide a mechanism by which members of the class (which was certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure) may opt out of the settlement.

The parties submitted the Consent Decree to the district court for approval, and written notice of the proposed settlement was mailed to all class members, who were given more than two months to submit written objections to the court. Pursuant to this procedure, approximately fifteen percent of the class submitted signed petitions and/or brief comments on the proposed settlement.[3] A fairness hearing then was held, during which

[3] Certain objections were addressed by the parties prior to the fairness hearing. For example, the Decree was amended to clarify

objectors, many of whom were represented by counsel, were permitted to present their objections orally to the court. Following the hearing, the court took the Decree under advisement.

The Decisions Below

On September 1, 1989, the district court issued an opinion approving the Consent Decree. The judge, who had been supervising this litigation from its outset, carefully examined the provisions of the settlement negotiated by the parties, along with the various objections to it, and determined that the Consent Decree was fair, adequate, and reasonable. He determined that the extensive equitable and other relief provided by the Decree was appropriate, particularly in light of the uncertainty as to what, if anything, plaintiffs would recover if this complex case were tried. The judge found that the heart of the Decree was the class-wide equitable relief embodied in the monitoring system and related provisions and that the monetary relief provided was of secondary importance. In this regard, the court found that "[t]he complaint of race discrimination in the appraisal system is met and resolved through this adjustment system of monitoring discretionary salary increases and promotions." Pet. App. at 7a. Because of the nature of this Rule 23(b)(2) action and the extensive class-wide equitable relief provided by the Decree, the judge, in his discretion, declined to permit dissatisfied class members to opt out of the settlement.

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that class members are not precluded from pursuing claims, including claims of retaliation, arising after the effective date of the Decree. The language of the Decree also was clarified to ensure that relief for ex-employees would not exclude class members who had been involuntarily terminated by GM.

A number of objectors complained of the lack of an opt out provision in the Decree. This issue, as discussed more fully below, was carefully considered by both of the courts below before approving the Decree.

The Sixth Circuit carefully analyzed the factual and procedural background of this case in affirming the district court's approval of the Decree in general and its denial of opt out in particular. The court concluded that an opt out provision here would defeat the goals of judicial economy and efficiency that support class certification under Rule 23(b)(2). The court also concluded that permitting opt out would have eliminated any incentive for GM to settle this class action. Pet. App. at 30a-31a. As GM argued below, an opt out procedure would render the Consent Decree essentially unworkable and grossly unfair, because the primary relief sought in this case (and the primary relief provided in the Consent Decree) is equitable relief. The relief provided by the Decree is designed to benefit *all* incumbent black employees, and the monitoring formula is based on the characteristics of the whole employee population. Thus, individuals permitted to opt out, unlike their fellow class members, would receive the benefit of the decree *without* giving up their own individual claims. Furthermore, any attempt to exclude class members who opted out from the group and individual monitoring relief would be an insurmountable administrative burden and would impair the entire monitoring process.

The court therefore held that it was not an abuse of discretion for the district court to deny opt out. In so holding, the court noted generally that "[t]here is no absolute right to opt out of Fed. R. Civ. P. 23(b)(2) class actions." *Id.* at 30a. It did *not* hold that an opt out provision can *never* be appropriate in a Title VII class action. Rather, the court held simply that in *this* class action, denial of opt out was an appropriate exercise of judicial discretion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE SIXTH CIRCUIT'S HOLDING THAT IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO APPROVE A CONSENT DECREE WITHOUT AN "OPT OUT" PROVISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The sole issue of substance raised by the Petitioners here—an alleged split among the circuits[4]—is not presented by this record, because the Sixth Circuit did not hold that opt outs are not proper in Rule 23(b)(2) cases. Rather, the Sixth Circuit's decision (like the decisions of other appellate courts that Petitioners claim are in conflict with it) relies on the well-settled principle that whether to allow opts out in such a case is a matter committed to the discretion of the district judge supervising the action.

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[4] This "split among the circuits" argument, while lacking merit, is Petitioners' only argument that is even worthy of the Court's consideration. For example, the contention that the Sixth Circuit's approval of the Consent Decree denied Petitioners due process and equal protection, which surfaced fleetingly in the first of Petitioners' Questions Presented, was abandoned by Petitioners themselves.

The notion that a split of authority is created by the lower courts' general approval of the Consent Decree—also suggested in the first Question Presented—is equally unworthy of serious consideration. Whether to approve a class action settlement is an extremely fact-sensitive question. Here, both the trial and appellate courts applied well-settled legal standards to the facts of this case and concluded that the Consent Decree should be approved as fair, adequate, and reasonable. Other courts, on different facts, have found that other decrees did not meet this standard. This, of course, does not make such decisions inconsistent with the decision below, nor does it give rise to a "conflict" that this Court must intercede to resolve.

Finally, the second of Petitioners' Questions Presented—whether the Sixth Circuit improperly excluded certain documentation from the record on appeal—relies on a mischaracterization of the proceedings below and also should be disregarded. *See infra* note 12.

Petitioners'[5] claim, that "[t]he Sixth Circuit's decision [not to permit opt out]in this case is in conflict with the Eleventh Circuit's [decisions permitting opt out]," Pet. at 24 (citing *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986), and *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983)),[6] cannot withstand even minimal scrutiny. A fundamental tenet of the holding below, and of every case that has addressed the opt out issue in a Title VII class action, is that Rule 23(b)(2) class members have no absolute right to opt out. This basic principle flows directly from the language and structure of Rule 23 itself. Rule 23(c)(2) provides that notice of a right to opt out is *mandatory* in class actions certified under Rule 23(b)(3). In contrast, Rule 23 contains no such express requirement for class actions, like this one, certified under Rule 23(b)(2). Whether to give class members notice of the class action, as well as the content of such notice, is left to the discretion of the district court in non-23(b)(3) actions. *See* Fed. R. Civ. P. 23(d)(2). Consistent with the plain language of the Rule, no court of appeals, including the Eleventh Circuit,

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[5] Except for Larry Dodson, who was a named party in the district court and in the court of appeals, the Petitioners named herein are not properly before this Court. As GM argued in the court of appeals, unnamed class members who, like Messrs. Adams, Lawrence, and Smith, failed to intervene as parties at the district court level lack standing to challenge a consent decree on appeal. The Sixth Circuit, given its decision on the merits, found it unnecessary to address the standing issue. *See* Pet. App. at 29a-30a.

[6] Apparently, Petitioners rely chiefly on the *Holmes* case, since their opt out argument consists mainly of lengthy, unattributed quotations from the *Holmes* opinion. *See* Pet. at 24-27. Included in one such passage is the observation that "the United States Supreme Court has not yet decided whether opting out of Rule 23(b)(2) classes is ever permissible." Pet. at 26. This of course does not help Petitioners, as the fact that a question has not been resolved by this Court has never been a recognized basis for a grant of certiorari.

has held that opt out must be permitted in *every* 23(b)(2) class action.

The cases relied on by Petitioners all have recognized that opt out is not required in Rule 23(b)(2) cases. *See, e.g., Holmes*, 706 F.2d at 1153 ("The general rule in this circuit remains that absent members of (b)(2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action."); *Penson v. Terminal Transport* Co., 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981) (In the Fifth Circuit, "a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, even where monetary relief is sought and is made available.").[7] These cases have held simply that district courts in appropriate cases *may* permit class members to opt out of Title VII class actions, subject to appellate review under an abuse of discretion standard.[8] While the Sixth Circuit has not expressly adopted this view of opt out under Rule 23(b)(2), neither has it rejected it. In fact, the Sixth Circuit here reviewed the district court's decision under the *Holmes* "abuse of discretion" standard in concluding that the district court had acted within its discretion in denying opt out.[9] Thus, the legal principles underlying the decision below and the

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[7] *Penson's* statement of the rule of law in the Fifth Circuit was based on a survey of Fifth Circuit cases, including *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), on which Petitioners also rely. *See* Pet. at 25.

[8] The district court below took this approach as well. Regarding the determination whether to permit opt out in a Rule 23(b)(2) class action, the court stated: "I think that under the case law as I read the rule, that is discretionary." *See* Jan. 31, 1989 Hearing Transcript at 3, *quoted in* Petition at 7. The district court thus recognized that the law of the Sixth Circuit did not preclude such an approach, and the Sixth Circuit, of course, did not disagree.

[9] Even assuming *arguendo* that the opinion below leaves open the possibility that the Sixth Circuit might reject the *Holmes* view in some future case, there still exists no more than a *potential* con-

decisions relied upon by Petitioners are perfectly consistent.[10] There is no "conflict" created here that requires Supreme Court review of the opt out issue.[11]

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flict among the circuits. The state of the law in the lower federal courts, even viewed in the light most favorable to Petitioners, simply is insufficiently developed to create a true conflict or to frame this issue adequately for consideration by this Court.

Even if the decision below could be read as creating a direct conflict, the limited precedential value of this unpublished opinion, *see* 6th Cir. R. 24, would militate against granting the Petition.

[10] Petitioners' authorities are also factually distinguishable from the present case. For example, in *Holmes*, on which Petitioners principally rely, prospective equitable relief was *not* predominant. The *Holmes* decree provided for some prospective relief, but at the time the case was decided, the facilities at which all the named plaintiffs and the great majority of class members had been employed had been permanently shut down; thus, the prospective relief was essentially moot, and all that was at issue on appeal was the allocation of monetary relief. *See* 706 F.2d at 1146 n.1. The case thus resembled a Rule 23(b)(3) action much more than a 23(b)(2) action. This stands in stark contrast to the present case, where the courts below have found that the Decree's broad prospective relief is the crux of the parties' settlement and that monetary relief is of secondary importance.

In *Penson v. Terminal Transport Co.*, the consent decree in question required notice of an opt out right, but the notice that Mr. Penson received did not so inform him, due to an error in the form of the notice. *Penson* thus did not present the issue of the propriety of opting out of a Rule 23(b)(2) action, and, like *Holmes*, is inapposite.

In *Cox v. American Cast Iron Pipe Co.*, the issue on appeal was whether opt out should be permitted prior to the monetary relief stage of a class action "pattern or practice" trial. Thus, it too is inapposite and is not in conflict with the decision below. The same is true of *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983), where opt out was permitted in an action that was certified under Rule 23(b)(2) *and* (b)(3) and was treated as a 23(b)(3) action in the district court.

[11] Even if this Court agreed that the "conflict" urged by Petitioners exists and granted the Petition, it would make no difference

II. BECAUSE THE DECISION BELOW DOES NOT CREATE A SPLIT AMONG THE CIRCUITS AND PRESENTS NO ISSUE OF LAW FOR RESOLUTION BY THIS COURT, THE ONLY ISSUE TRULY PRESENTED HERE IS WHETHER THE DISTRICT JUDGE, GIVEN THE FACTS AND CIRCUMSTANCES OF THIS CASE, ABUSED HIS DISCRETION IN APPROVING THE CONSENT DECREE; THE SIXTH CIRCUIT CORRECTLY HELD THAT HE DID NOT.

As demonstrated above, there is no split among the circuits on the question whether an opt out provision in a consent decree settling a Rule 23(b)(2) class action is ever permissible. Nor is there any other issue of law presented for resolution in this case, because the courts below merely applied the well-settled "fair, adequate, and reasonable" standard to the complex facts of this case in determining that the parties' settlement of this class action should be approved and implemented.[12]

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in the outcome of this case. As noted above, the Sixth Circuit assumed *arguendo* that the *Holmes* "abuse of discretion" standard urged by Petitioners applied here, and it analyzed the facts of this case under that standard. The court rightly concluded that the district court acted well within its discretion in approving the Consent Decree without providing an opt out mechanism for dissatisfied class members. Thus, even if this Court were to grant review, reverse the decision below, and remand to the Sixth Circuit for consideration under the "proper" rule of law, nothing ultimately would change. The resources of this Court should not be mobilized to decide a question that will make no difference in the outcome of the case before it. For this additional reason, the Petition should be denied.

[12] Petitioners purport to raise a "due process" issue by challenging the court of appeals' "denial of oral arguments and documentation (National Reporting System—NRS) which would support Petitioner's and Objectors position." Pet. at 32. This is a non-issue that this Court should disregard. The Sixth Circuit in fact accepted the NRS Agreement in question, as part of Plaintiffs-Appellants' Joint Appendix. *See* Resp. App. at 1a (Order of Dec. 20, 1990); Resp. App. at 2a-3a (excerpts from Appellants' Joint

Therefore, the only question truly presented by this case is whether, under these facts, approving the Decree without providing for opt out was an abuse of discretion. But examination of such a fact-bound issue (particularly under the deferential abuse of discretion standard) is an exercise unworthy of this Court's time and attention, as it is well settled that this Court "[does] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

In any event, there was no abuse of discretion here. The courts below correctly found that class-wide equitable relief is the crux of this settlement. GM's commitment under the monitoring system to respond to any statistically significant race-based differences in pay levels and promotions is a remedy for all incumbent class members. Class members permitted to opt out and pursue individual claims, however, still would benefit from this significant systemic relief. As noted above, *see supra* p. 5, this result would be unfair to both GM and the class

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Appendix). The court did so despite GM's argument that this document and the objectors' arguments relating to it (which were being introduced for the first time on appeal) were not properly before the court. In addition, most of Mr. Hawkins' oral argument before the Sixth Circuit panel dealt with the same NRS-related issues he now raises in the Petition. Thus, the denial of due process Petitioners complain of was not a "denial" at all, and does not justify issuance of the writ.

Even if the court had excluded the NRS Agreement, such a ruling would simply have been a straightforward application of the rule excluding from the record on appeal any evidence that was not part of the record in the district court. *See* Fed. R. App. P. 10(a). This would have been an unassailable exercise of the court's discretion, providing no basis whatsoever for granting the Petition.

In any event, the NRS Agreement raises no more than a minor factual issue encompassed within the court's general determination that the Consent Decree is fair, adequate, and reasonable. To the extent there is a cognizable issue here at all, it is not a question of law and certainly is not of sufficient importance to justify review by this Court.

and would render the Decree essentially unworkable. Given the breadth and the predominantly equitable nature of the relief provided by the Decree, the Sixth Circuit was correct in stating that an opt out requirement in this case would have undermined settlement by eliminating any incentive for GM to enter into a consent decree at all. Thus, these were perfectly appropriate circumstances for the district court, in its discretion, to approve certification and settlement under Rule 23(b)(2) without providing for opt out. It was not an abuse of that discretion to do so.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DENNIS HAZEN HUGULEY, *et al.*, (Class Action),
Plaintiff-Appellee

LARRY DODSON, *et al.*, (Objectors—Class Action),
Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee

ORDER

[Filed Dec. 20, 1990]

Upon consideration of the stipulation of attorneys Dillard and Hawkins to file (together) a joint appendix with the court, and the response of appellant Dodson in opposition thereto,

It is ORDERED that the motion be, and it hereby is, granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

APPEAL TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals No. 89-2172

District Court 83-2864

DENNIS HAZEN HUGULEY, *et al.*, (Class Action),
Plaintiffs/Appellees,

LARRY DODSON, *et al.*, (Objectors—Class Action),
Plaintiffs/Appellants,

-vs-

GENERAL MOTORS CORPORATION,
Defendant/Appellee.

JOINT APPENDIX

VOL. IV

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Case No. 89-2172

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SUPPLEMENTAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 23, Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those

whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 10(a), Federal Rules of Appellate Procedure

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.